

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAWRENCE JOHNSON,	§
	§ No. 588, 2008
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9506017339
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 24, 2009

Decided: June 15, 2009

Before **HOLLAND, BERGER** and **JACOBS**, Justices

**ORDER**

This 15<sup>th</sup> day of June 2009, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Lawrence Johnson, filed an appeal from the Superior Court's November 10, 2008 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In August 1995, Johnson was charged by indictment with 3 counts of Murder in the First Degree, Robbery in the First Degree, Burglary in the Second Degree, Conspiracy in the First and Second Degrees, and 12 counts of Possession of a Firearm During the Commission of a Felony. In December 1996, a Superior Court jury found Johnson guilty of 2 counts of

Murder in the First Degree, Robbery in the First Degree, Burglary in the Second Degree, Conspiracy in the Second Degree, and 8 counts of Possession of a Firearm During the Commission of a Felony. Johnson was sentenced to 2 life terms without the possibility of probation or parole plus a total of 126 years. This Court affirmed Johnson's convictions on direct appeal.<sup>1</sup> This Court also affirmed the Superior Court's denial of Johnson's first postconviction motion.<sup>2</sup>

(3) In this appeal, Johnson asserts several claims that may fairly be summarized as follows: a) his conviction of criminally negligent felony murder pursuant to Del. Code Ann. tit. 11, § 636 is invalid because it is impossible to simultaneously be criminally negligent and advance a felony; b) the evidence does not support his convictions of two felony murders because the murder could not have simultaneously facilitated both a burglary and a robbery; c) his felony murder convictions must be overturned because the Superior Court gave improper instructions to the jury. Invoking the “fundamental fairness” exception of Rule 61(i) (5), Johnson further argues that his claims overcome all of Rule 61's procedural bars.

(4) A postconviction motion pursuant to Rule 61 must first meet the procedural requirements of the rule before the Superior Court may

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<sup>1</sup> *Johnson v. State*, 709 A.2d 1158 (Del. 1998).

<sup>2</sup> *Johnson v. State*, Del. Supr., No. 641, 2006, Ridgely, J. (Jan. 18, 2008).

address the substantive issues.<sup>3</sup> Former Rule 61(i) (1) required that Johnson's postconviction motion be filed within 3 years of the issuance of this Court's mandate in connection with his direct appeal.<sup>4</sup> The record reflects that the mandate in Johnson's case issued in June 1998. Because Johnson's second postconviction motion was filed in February 2008, it plainly is time-barred. Moreover, because none of the claims asserted in his second postconviction motion were asserted in his first postconviction motion, they are barred as repetitive under Rule 61(i) (2) and because none of the claims were raised in his direct appeal, they are procedurally defaulted under Rule 61(i) (3), in the absence of any evidence of "cause" and "prejudice" as required by Rule 61(i) (3) (A) and (B).

(5) While Johnson argues that the procedural bars should not be applied to his claims because they fall under the "fundamental fairness" exception of Rule 61(i) (5), such is not the case. Contrary to Johnson's first claim, it is possible for a defendant to engage in conduct that both furthers the commission of a felony and results in a death due to criminal negligence under Del. Code Ann. tit. 11, § 636.<sup>5</sup> Contrary to Johnson's second claim, it is possible for a defendant to participate in a murder that furthers both the felony of burglary and the felony of robbery. In Johnson's case, the

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<sup>3</sup> *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

<sup>4</sup> The former rule applies because Johnson's conviction became final before July 1, 2005.

<sup>5</sup> *Burrell v. State*, 953 A.2d 957, 962 (Del. 2008) (citing *Hassan-El v. State*, 911 A.2d 385, 391-92 (Del. 2006)).

evidence was that a gun store owner was found shot dead a few feet from a gun cabinet that had been unlocked and the contents removed, supporting a conviction of both felonies.<sup>6</sup> Finally, contrary to Johnson's third claim, there is no evidence that the Superior Court gave the jury improper instructions with regard to the above charges. To the extent that Johnson argues that the jury was improperly instructed on accomplice liability, that claim also fails. Johnson's direct participation in the murder was not required if the evidence supported his guilt as an accomplice,<sup>7</sup> which the jury found it did. Because Johnson's claims do not fall under the "fundamental fairness" exception, they are procedurally barred under Rule 61. As such, the Superior Court's judgment must be affirmed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>6</sup> Del. Code Ann. tit. 11, §§ 825(a) and 832(a).

<sup>7</sup> Del. Code Ann. tit. 11, § 271.